IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 255 OF 2003

1. Nitin Yedaba Gaikwad
2. Prakash Yedaba Gaikwad
3. Yuvraj Yedaba Gaikwad
4. Pappu Yedaba Gaikwad
5. Dayanand Yedaba Gaikwad
6. Savitribai Yedaba Gaikwad

All R/o Mungashi, Taluka Barshi, Dist. Solapur ..Appellants (Org.Accd.Nos.1 to 6)

Versus

The State of Maharashtra ..Respondent

Mr. Ujwal Agandsurve for appellants.
Mrs.Usha V. Kejriwal, APP for respondent-State.

CORAM: B.H. MARLAPALLE & R.S. MOHITE,JJ.

Date : February 14, 2007.

ORAL JUDGMENT (PER R.S. MOHITE, J.):

1. This is an appeal filed by the appellants, Nitin Yedaba Gaikwad, Prakash Yedaba Gaikwad, Yuvraj Yedaba Gaikwad, Pappu Yedaba Gaikwad, Dayanand Yedaba Gaikwad and Savitribai Yedaba Gaikwad (hereinafter referred to as accused nos.1,2,3,4,5 and 6 respectively) impugning the judgment and order passed by the II Additional Sessions Judge, Solapur on 31/1/2003 in Sessions Case No. 41 of 2002. By the

impugned Judgment and Order all the accused are convicted for an offence punishable under Sections 147 of the IPC and on this count are sentenced to suffer RI for three months and to pay a fine of Rs.500/- each, in default to suffer SI for one month. All the accused are further convicted for an offence punishable under Sections 302 read with Section 149 of IPC and on this count are sentenced to suffer life imprisonment and to pay a fine of Rs.1000/- each, in default to suffer RI for one month. Accused No.1 Nitin is also convicted for an offence punishable under Section 148 of IPC and is sentenced to suffer RI for six months and to pay a fine of Rs.500/-, in default to suffer SI for one month. The accused were acquitted of the offence punishable under Section 135 of the Bombay Police Act.

2. The brief facts of the prosecution case were as under:-

(a) All the accused persons are members of one family. Accused Nos.1,2,3,4 and 5 are real brothers and accused no.6 is their mother. All the accused persons were residing in the Harijanwadi at village

Mungashi, Taluka Barshi in District Solapur. Deceased Kisan Anna Nagtilak was the son of P.W.1 Anna Ambadas Nagtilak. P.W.1 Anna was residing in the same Harijanwadi where the accused used to reside. His house was located at a distance of about 100 to 140 ft. away from the house of the accused. He was residing along with the deceased Kisan, two other sons by name Maruti and Shankar and his daughter-in-law, the wife of Kisan.

(b) Kisan was working as a labourer at the ongoing work of the construction of a percolation tank within the limits of village Ratanjan. Accused no.2 Prakash was also working at the same site. P.W.2 Arun Apparao Sathe was the gangman who used to manage the labourers working at the site.

(c) On 3/12/2001 at about 12 noon there was a quarrel between deceased Kisan and accused no.2 Prakash at the site where they were working. After finishing his work, deceased Kisan returned home at about 5.30 p.m. P.W.1 Anna was out of the home when Kisan returned and Anna after grazing the cattle returned at about 6 p.m. When he was tying his

cattle, his son Kisan told him about the quarrel which had taken place between him and accused no.2 Prakash at 12 noon. While deceased Kisan was narrating the incident to PW 1 Anna, all the accused persons came to the house of P.W.1 Anna. At that time, P.W.2 Arun Sathe was present in the house of Anna, as he had come there on hearing about the quarrel between Kisan and Prakash and intended to help in settling the said quarrel.

(d) That after arriving there, all the accused persons started assaulting Kisan by giving him fist and kick blows. P.W.1 Anna tried to intervene and started entreating the accused persons not to assault Kisan. At that time accused no.1- Nitin took out a knife from his pocket and stabbed Kisan with it on his chest. On receiving this injury Kisan collapsed. Accused persons then fled from the spot.

(e) P.W.1 Anna went in search of a vehicle to take Kisan to the hospital. He met the Ex-surpanch of the village by name Idrasen, who arranged for a jeep from village Upale. Kisan was taken to the hospital at Vairag, but at the hospital he was declared dead

before admission. P.W.1 Anna then went to the police station at Vairag and lodged a complaint. His complaint was recorded as the First Information Report (Exh.23).

(f) After registering an offence under Sections 147, 148, 149 and 302 of IPC and under Section 135 of Bombay Police Act vide C.R. No.105 of 2001, the police commenced investigation.

(g) P.W.4 API Kuber Dhondiba Chavare was the I.O. and after registering the crime, he proceeded to the Primary Health Centre at Vairag where the dead body of the deceased was lying and there he conducted the inquest panchanama (Exh.24). That thereafter he proceeded to the spot of the incident and prepared the spot panchanama (Exh.26). From the spot, he seized a sample of blood stained earth, a sample of simple earth and two pairs of black chappals. On the same day he recorded the statements of 9 witnesses, including one Avinash Kurund and arrested the accused persons. He issued a requisition to the Primary Health Centre, Vairag for conducting a post mortem on the dead body of the deceased on 4/12/2001. He

forwarded the accused persons for medical examination to the Primary Health Centre, Vairag along with his requisition letter dated 5/12/2001. The said requisition letter (Exh.31) was forwarded after making an entry in the station diary (extract at Exh.32). The Medical Officer, who examined the accused noted on the requisition (Exh.31) that he found no major disease or injury on the persons of the accused. In the meanwhile at about 6.30 p.m. accused no.2 Prakash had filed a complaint stating that he and four other family members i.e. accused nos.1,3,5 and 6 had gone to the house of the accused to make an inquiry as to why accused no.2 Prakash had been beaten by the deceased Kisan, but the deceased had raised a quarrel and assaulted the aforesaid members from the accused family. The I.O. registered an N.C. on this complaint made by accused no.2 Prakash. He then seized the clothes on the person of the deceased Kisan under a seizure panchanama and on 4/12/2001 he also seized the clothes of all the accused persons under a separate seizure panchanama (Exh.35). On 7/12/2001 accused no.1 Nitin made a statement before the I.O. that he would produce a knife from the place where he had concealed it. The I.O. then recorded a

memorandum statement of the accused no.1 in the presence of panchas and in pursuance of the said memorandum the accused no.1 led the police to his house and produced a knife from a niche in the western wall of his house. The said knife was a button knife with a blade of 6 inch and it was found that there were blood stains on the said knife. The knife was then seized by the I.O. under a panchanama (Exh.42) and sealed. On 12/12/2001 the I.O. forwarded all the seized articles to the Chemical Analyser under a Yadi along with a Police Constable. On completion of the investigation, on 28/1/2002, the I.O. filed a charge-sheet. After the charge-sheet was filed the C.A.'s report was received and the same was also filed on the record in the trial court.

3. After the committal of the case to the Court of Sessions, a charge came to be framed by the trial court. In order to prove its charges, the prosecution examined in all four witnesses. P.W.1 Anna Ambadas Nagtilak and P.W.2 Arun Sathe were the two eye witnesses who had witnessed the incident. P.W.3 Popat Kalidas Kashid was examined as a panch to prove the recovery of clothes from the persons of the accused.

P.W.4 API Kuber Dhondiba Chavare was examined as he was the I.O. The defence of the accused was of denial. No defence evidence was led. On perusal of the ocular and documentary evidence adduced by the prosecution on record, the trial court was pleased to convict and sentence the accused as aforesaid.

4. On behalf of the defence, it was contended that all the family members from the family of the accused had been roped in due to local political rivalry of the village. It was contended that from the N.C. lodged by accused no.2 Prakash, which was in fact lodged prior to the recording of the FIR, it was evident that Prakash had, in fact, earlier been beaten by deceased Kisan at about 12 in the noon on the date of the incident. That accused nos.1,2,3,5 and 6 had gone to the house of the deceased to find out as to why Kisan had assaulted accused no.2 Prakash. It was contended that when the accused were asked about this, they started a quarrel and abused and beat the accused who were present there and in the process the accused also suffered injuries. In the alternative, it was contended that the common object of the entire assembly was not to kill the deceased Kisan and at the

very highest, it could only be said that the object of the assembly was to quarrel and beat the deceased Kisan in retaliation of his earlier act of beating accused no.2 Prakash. It was pointed out that as far as accused nos.2 to 6 were concerned, they had come to the spot without carrying any weapons, that even the prosecution story was that they had assaulted with fist and kick blows. That apart from the single stab wound, only minor abrasions were found on the body of the deceased Kisan. It was, therefore, contended that at the highest the accused nos.2 to 6 ought to have been convicted under Section 323 read with Section 147, 148 and 149 of the IPC and ought not to have been convicted under Section 302 read with Section 149 of IPC.

5. The learned Prosecutor supported the reasoning given by the trial court. She contended that all the accused persons who were members of a family had come to the house of the accused with an intention of doing away with Kisan. They had come with pre-planning as accused no.1 Nitin was carrying a knife in his pocket. She argued that all the accused persons were attributed overt acts of beating the deceased Kisan

and in the circumstances, the conviction under Section 302 read with Section 149 of IPC was proper.

6. We have heard both the parties at length and perused the entire record before us. In our view, the appeal deserves to be partly allowed in terms of the operative order, which follows, for the reasons which are mentioned herein below.

7. As regards the two eye witnesses i.e. P.W.1 Anna and P.W. 2 Arun, we find no reason whatsoever to disbelieve their testimony. In the evidence of P.W.2 Arun, we have noted that there is a minor improvement in so far as he had not stated in his police statement about the role of accused nos.2 to 6 in holding Kisan while Nitin assaulted him with a knife. This improvement, however, does not pertain to the actual assault on Kisan by accused nos.2 to 6. We are also not inclined to accept the argument that it was P.W.1 Anna and members of his family i.e. Kisan and his brothers who started the assault. It is true that the witnesses have admitted that at the time of the incident, there was commotion and exchange of abuses before the physical scuffle between the accused and

the complainant actually started. However, from this fact alone it cannot be concluded that complainant and his family members were the aggressors. The contention on behalf of the accused that the accused were injured does not find any substantiation from the record. It is true that the I.O. stated in his evidence that the accused persons had been sent for medical examination at the Medical Health Centre, but the endorsement of the doctor on the requisition for medical examination (Exh.31) clearly indicates that no major injury was found on their persons. In such circumstances, the prosecution did not examine the doctor who had examined the accused and the accused also chose not to lead any defence evidence regarding the injuries alleged to have been inflicted on them. In their 313 statement also, the accused have not come forth with any story relating to injury being inflicted and have chosen to take up the defence of total denial. Even if the N.C. lodged by the accused no.2 Prakash is read, the same contains a clear admission that accused nos.1,2,3,5 and 6 were present at the house of the deceased when the incident took place. Further corraborating the ocular evidence is the fact that the clothes of the accused have been

found to be stained with human blood and the blood group tallies with the blood group of the deceased as determined from the clothes taken from the person of the deceased. In the circumstances, it is clear that the commission of an offence by the accused has clearly been established by the prosecution.

8. The question that, however, remains is as to what offence has been committed and by whom. As far as accused no.1 Nitin Yedaba Gaikwad is concerned, he is the person who inflicted the fatal stab wound on the chest of the deceased Kisan. The post mortem notes which were admitted in the evidence by consent indicates that the injuries suffered by the deceased were the following:-

(a) Single stab wound over cardiac area piercing through into cardiac cavity, 1.5 cm. in breath, 3 cm. in length and 6 cm. in depth.

(b) Multiple irregular abrasions all over the body.

9. Corresponding to the aforesaid wound, the peri-cardium Heart and large vessels of the deceased were found lacerated anteriorly. The doctor opined that the cause of death was due to injury to vital organ (heart) and haemorrhagic shock. There is no doubt in our mind that this injury was inflicted on a vital part by accused no.1 with an intention of causing death. Accused no.1 must, therefore, be held to have committed an offence punishable under Sections 302 and 148 of the IPC. As regards accused nos.2 to 6, however, we feel, it would be unsafe to convict all of them for an offence punishable under Section 302 read with Section 149 of IPC. Firstly, it is an accepted position that all these accused came to the house of the P.W.1 Anna without any weapons whatsoever and assaulted the deceased with hands and legs. Apart from the fatal wound inflicted by accused no.1, there is no other grievous wound suffered by the deceased Kisan. All the other injuries were in the nature of simple abrasions found on the body of the deceased. The location of these abrasions is not mentioned in the post mortem notes and it is not found that there were any other internal injuries associated with any

of these abrasions. The prosecution did not examine the doctor to prove that any of these abrasions had caused any internal wound or that any grievous injury had resulted from the beating said to have been inflicted by accused nos.2 to 6. The evidence indicates that while the scuffle was going on, accused no.1 Nitin suddenly removed a knife from his pocket and stabbed the deceased Kisan on his chest. There is no material on record to indicate that the other accused had conspired to kill the deceased Kisan or were aware that accused no.1 Nitin was carrying a knife concealed in his pocket. In this regard the advocate for the accused relied upon a judgment of the Apex Court in the case of Thakore Dolji Vanvirji and ors. vs. State of Gujarat **[1992 Cri.L.J. 3953]** where the facts were that out of the five accused, only one had inflicted a sword injury on the head and though the other accused were said to have inflicted blows by dangerous weapons, the other injuries suffered by the deceased were found to be simple in nature. In such circumstances, the Supreme Court, on analysing the applicability of section 149 of the IPC, proceeded to convict only the accused who had inflicted the sword blow under Section 302 of IPC and

concluded that as far as other accused are concerned, the common object of the unlawful assembly was to cause grievous hurt to the deceased. These other accused were, therefore, convicted under Section 326 read with Section 149 of IPC and sentenced to undergo RI for seven years. We accept that the facts before the Apex Court were some what akin to the facts in the present case, though in the case before the Apex Court, the other accused were also carrying dangerous weapons and had actually used them. In our view in the present case it would be safer to hold that the common object of the unlawful assembly consisting of the present accused must have been to inflict simple injury by way of retaliation to the assault made on accused no.2- Prakash in the earlier incident which occurred at 12 noon on the date of the incident. In our view, it would be, therefore, proper to convict accused nos.2 to 6 for the offences punishable under Section 147 and Section 323 read with Section 149 of IPC.

10. In the result, by partly allowing the appeal, we pass the following operative order which will substitute the convictions and sentences as imposed by

the trial court:-

(a) The conviction and sentence of accused nos.1 to 6 for the offence under Section 147 of the IPC and the conviction and sentence of accused no.1 for an offence under Section 148 of IPC is hereby confirmed on the same terms as in the judgment and order of the trial court.

(b) Accused nos.1 to 6 are convicted for the offence punishable under Section 323 read with Section 149 of the IPC and are sentenced to suffer RI for six months and to pay a fine of Rs.1000/- each, in default to suffer RI for one month. They are, however, acquitted for the offence punishable under Section 302 read with Section 149 of IPC.

(c) Accused No.1 - Nitin Yedaba Gaikwad is convicted for an offence punishable under Section 302 of IPC and is sentenced to suffer RI for life and to pay a fine of Rs.1000/-, in default to suffer RI for one month.

(d) Muddemal articles will be preserved till the period of appeal is over.

(e) All the sentences to run concurrently and the accused to get the benefit of set off under Section 428 of the Code of Criminal Procedure, 1973.

(f) The accused who have not undergone the full term of the sentences as imposed aforesaid and who are on bail shall surrender forthwith so as to undergo the remaining term of sentences forthwith. Their bail bonds to stand cancelled.

. Appeal to stand disposed off accordingly.

(R.S. Mohite, J.) **(B.H. Marlapalle,J.)**